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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re B.S., a Person Coming Under the
Juvenile Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

R.M. et al.,

Defendants and Appellants.

B202861

(Los Angeles County
Super. Ct. No. CK42519)

APPEAL from an order of the Superior Court of Los Angeles County. Marilyn H. Mackel, Commissioner. Affirmed.

Donna Balderston Kaiser, under appointment by the Court of Appeal, for Defendant and Appellant R.M.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, Judith A. Luby, Deputy County Counsel, for Plaintiff and Respondent.

Kimberly A. Knill, under appointment by the Court of Appeal, for Minor and Appellant B.S.

R.M. (mother) and her daughter, B., both appeal from the October 10, 2007 order denying mother's Welfare and Institutions Code section 388 petition seeking orders (1) terminating a legal guardianship over B. and (2) returning B. to mother's custody.¹ We affirm the order.²

FACTUAL AND PROCEDURAL BACKGROUND

B. was born in April 1994. In May 2003, she was nine years old when she became the subject of a section 300 petition alleging that her then legal guardian (maternal grandmother) had failed to provide the necessities of life and that mother was unable to care for her. In August 2003, B. filed a section 388 petition seeking to terminate the legal guardianship. The juvenile court granted B.'s section 388 petition, terminated the legal guardianship, dismissed the section 300 petition, and ordered B. placed with her paternal aunt, Traci B., for an "extended" visit pending the next court date. In January 2004, B. was formally placed with paternal aunt. In May 2004, the juvenile court identified legal guardianship with paternal aunt as the permanent placement plan.³ In June 2004, B.

¹ All undesignated statutory references are to the Welfare and Institutions Code.

² In a letter brief, the Los Angeles County Department of Children and Family Services (DCFS) stated that it did not oppose reversal of the order, but, when questioned at the hearing as to whether that was still DCFS's position, counsel stated that DCFS now favors affirmance of the order. Since DCFS offered no additional legal or factual argument in support of its change of position, mother and B. were not prejudiced by it.

³ Meanwhile, also in May 2004, the juvenile court sustained a section 300 petition as to mother's three younger children, B.'s half siblings (the half siblings). Although the half siblings were briefly returned to mother in January 2006, they were re-detained several months later after mother was arrested for petty theft with a prior and violation of probation. While the half siblings remained placed with a paternal aunt (not the same aunt where B. was in placement) mother pled no contest and the juvenile court sustained a supplemental petition. It denied mother's multiple section 388 petitions and in March 2007, issued letters of guardianship for the half siblings. In case No. B197840, we affirmed that order.

relocated to Texas with paternal aunt and her family. In November 2004, letters of guardianship were issued to paternal aunt and her husband (paternal uncle).

Over the next several years, B. thrived in Texas. She remained in telephone contact with mother. According to an April 2006 Status Review Report, paternal aunt was considering accompanying B. to California to visit mother. The juvenile court ordered that B. have a summer break visit with mother if appropriate. The day of the hearing, mother was arrested, and a short time later the half siblings re-detained. In June 2006, mother married her then boyfriend, James G.; James's Live Scan report revealed convictions from 1988 through 2003 for narcotics related offenses, robbery, vandalism, infliction of corporal injury on a spouse, and violation of parole.

Over the next several months, mother's multiple section 388 petitions for return of the half siblings were denied.⁴ Paternal aunt brought B. to Los Angeles to visit mother from June 30, 2007 through August 18, 2007, while paternal aunt visited her own family in California. The visit went well and afterwards, B. told the social worker that she missed her mother and siblings and mother expressed a need to reunite with B.⁵ For the

⁴ In June 2007, jurisdiction of the half siblings was transferred to San Bernardino because that is where they lived with the legal guardian. The San Bernardino juvenile court refused to accept transfer of B.'s case because jurisdiction is based on legal residence and neither mother nor B. was a legal resident of San Bernardino.

⁵ In a letter dated August 5, 2007, apparently intended for the court, B. stated that she enjoyed the time she spent with mother over the summer and enjoyed seeing her siblings. She also stated that she enjoyed living with her aunt and cousins in Texas: "My [Aun]tie [T]raci is so nice to me. She provides new thing for me when I need them. The whole family comes out to support me in school activities. [¶] I really want to stay with my mom and siblings because I think it's not right to mess up our childhood were so [*sic*] far apart. [¶] It's hard being away from my family and not being able to see them only for a month which isn't that long. If I had any say so I would say people make mistakes and they shouldn't be punished for what mistakes they made in the past. The only thing I want to happen is for my family to be back. [¶] So far in my school in [T]exas I am going to the 8th grade but now I will be attending [H]opper Middle School. The activities I'm in right now are voll[e]yball [and] track. I run the 4 x 100, 4 x 200, and the 100 dash. In voll[e]yball I serve and play back position. In voll[e]yball you run. I don't

August 2007 review hearing, the social worker recommended no change in the placement order.

In a report prepared for a September 2007 review hearing, DCFS recommended that there be no change in the placement orders. But on September 7, 2007, mother filed a section 388 petition seeking termination of the legal guardianship and placement of B. with mother. As changed circumstances, mother alleged that she had successfully completed all the court ordered programs including random drug testing, the summer visit had gone well, and both mother and B. wanted to live together. Mother alleged: “[B.] would like to be with her mother as much as Mother would like her back. It is always in the best interest of children to be raised by their parents as long as it is safe to do so. [B.] is now 13 years old and would benefit from being raised by [mother].” The juvenile court set the matter for hearing the following month and ordered DCFS to prepare a report on B.’s best interests.

DCFS filed its report on October 4, 2007. It quoted from a letter paternal aunt (the legal guardian) wrote to the social worker on September 19, 2007. Although the letter is not attached, according to the report, the letter states:

“... I understand DCFS/court wants [B.] to write a letter at this time I do not think this is fair to [B.], because on Sept. 11, 2007 she had a very emotional conversation with [mother] because [mother] wanted her to write a letter stating that she wanted to come and live with her. [B.] told her she did not want to write a letter because she wanted to finish school with us in Texas and [mother] got very upset and hung up the phone. After I had a conversation with [B.] she stated that she would do 9 and 10th out in LA with [mother] and then come back in 12th to graduate in Texas and she said she wants to be able to change her mind just in case she decides she does not want to go to school in LA. But she says she does not want her mother to be mad. I feel that [B.] is confused and she wants to please other people except herself. It is not healthy for her to go back and forth. I plan on speaking with [mother] I just wanted to make sure that everything had calmed down. My best interest is for [B.][.] [A]t this time I do not feel she can write a letter and be totally honest [b]ecause she feel[s] bad because

really have a fav[o]rite subject but I like language arts. I have A-B [average]. I’m looking forward to my new school and meeting new people.”

since she told her mother what she wanted to do the comments her mother made and she has not heard from her mother since then. You can give this letter to the court because at this point I [do not] think anyone including [mother] should pressure [B.] to write a letter. I feel that if any time [B.] is ready to go live with her mother she will tell me and if she is interested in writing a letter she would let me know. [B.] is aware that I did not adopt her because I want to give her parents a chance to get it together in case one of them are able to get custody of her. I would never force her to [choose].”

Notwithstanding the legal guardian’s letter, DCFS recommended that B. be placed with mother with family maintenance and family preservation services.

At the hearing on October 4, 2007, the juvenile court expressed concern about DCFS’s recommendation, noting the need for stability in the life of a 13-year-old girl. It also remarked that the tenor of the letter from B. comports with the legal guardian’s observations as set forth in the report: “The real tenor of the letter to the court is that she is expressing the normal desire and concern to be with her biological parents rather but also the reality that she has strong attachments with the guardians with whom she has been in a permanent plan for a number of years.” The juvenile court commented: “The child was asked by her mother to write a letter in and [of] itself speaks volumes to the court about mother’s lack of understanding of what’s appropriate to this date; and [¶] she was told she didn’t want to write a letter and her mother got upset. That is simply not appropriate.”⁶ B.’s counsel stated that B. had consistently expressed a desire to return to mother. The juvenile court put the matter over to the following day for a telephonic trial so that B. participate from Texas. In response to the court’s asking what she thought about returning to live with mother, B. said, “I want to go back with her.” When asked why, B. said, “I have not been living with her for a long time and I just want to be back with my mom.” B. said that things were going “good” with her aunt in Texas, her grades were “average,” she was getting A’s and B’s in school, she had a lot of friends in Texas.

⁶ This elicited a denial from mother that she ever asked B. to write anything other than another letter about how much fun she had when visiting mother over the summer because mother had misplaced the previous letter. The juvenile court replied: “I am not convinced that you are being honest with this court.”

The last two summers, she had stayed with her mother in Los Angeles; they went to the movies, the mall, and the water park; and she saw the friends she made while living with her grandmother in Los Angeles that she kept in touch with from Texas. When asked by her own counsel how living with mother would be different than visiting her in the summer, B. stated: “It would not be fun anymore. I would have to go to school and keep my grades up and stuff.” B. stated that she really liked living with her aunt, but “really want to live with my mom.” The juvenile court asked B. whether B. thought “it might be a good idea for you to spend more holidays with your mother like all Christmas maybe even Thanksgiving and all summer and maybe go to summer school and have full responsibilities before we make it a permanent change.” B. responded: “It’s okay. I want to be with my mom permanently. [¶] THE COURT: So it’s okay. [¶] [B.]: I want it to be permanently. [¶] THE COURT: So it’s okay if you came out for visits for all of your holiday visits? [¶] [B.]: Yes. I would prefer to be with my mom. I would prefer to live with my mom and come out and visit my aunt and uncle on holidays and during the summer.” B. had the following colloquy with mother’s counsel: “[COUNSEL]: Do you have any questions about how your mom would take care of you? [¶] [B.]: No. [¶] [COUNSEL]: Are you aware that you and your mom may not always agree? [¶] [B.]: No, I think we would get along good.”

On October 10, 2007, after taking the matter under submission, the juvenile court denied mother’s section 388 petition without prejudice. The court expressed concern about mother’s commitment to her own stability “as reflected by her attitude and behaviors in this court. [¶] The mother has fought for her children and she’s to be commended for that. The ultimate reality is that the history of this case is one full of tremendous amount of upheaval that this court became aware of when [B.] was first detained in this court.” The court noted that it had recently found it was not in the best interests of the half siblings to return to mother after she was arrested, and they were re-detained. “I would dare say that had we not had the children who had been returned to the mother returned to us not long thereafter, the court would have more to look for in terms of the mother’s commitment to her own stability. And I dare say that her

commitment in the past year and her relationship with her husband and her own life stability as she has presented it to this court does not tell this court that we're going to have that kind of stability and permanence for [B.] if we upset this permanent plan of guardianship. It's a very difficult decision and at this point this court cannot terminate this guardianship under the facts and circumstances" DCFS was ordered to try to arrange for B. to have a holiday visit with mother and for B. to get adolescent counseling in Texas. Mother filed a notice of appeal that day. B. also filed a timely notice of appeal.

In a letter dated July 31, 2008, County Counsel advised this court that DCFS "[did] not oppose reversal and/or remand" and did not intend to file a respondent's brief.

DISCUSSION

Mother and B. both contend the juvenile court abused its discretion in denying mother's section 388 petition.⁷ They argue that B.'s stated desire to live with mother, mother's compliance with the case plan, and DCFS's recommendation that B. be returned to mother, all establish that the juvenile court abused its discretion. We disagree.

In determining whether to change a prior order (i.e., render a favorable decision on the petition), the juvenile court must consider a number of factors including the seriousness of the problem leading to the dependency; the reason the problem continued; the strength of the parent-child and child-caretaker bonds; the time the child has been in the system; the nature of the change of circumstance; the ease by which the change could be achieved; and the reason the change did not occur sooner. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532.)

When, as here, a section 388 petition is brought after reunification services have been terminated, the juvenile court's focus shifts to the child's needs for permanence and stability and away from the parent's interest in the care, custody and companionship of the child. (*In re Jacob P.* (2007) 157 Cal.App.4th 819, 824; *In re Angel B.* (2002) 97 Cal.App.4th 454, 464.) A child's wishes are not determinative of his or her best

⁷ B. adopts by reference mother's arguments on appeal.

interests, but it can be “powerful demonstrative evidence.” (*In re Michael D.* (1996) 51 Cal.App.4th 1074, 1087 (*Michael D.*) We review denial of a hearing on a section 388 petition for abuse of discretion. (*Angel B.*, at p. 460.) We will not disturb the decision “ ‘ “unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination” ’ [Citation.]” (*Michael D.*, at p. 1087.)

As the juvenile court observed, this was a difficult case. But, notwithstanding the fact that it is contrary to B.’s expressed wishes, we find no abuse of discretion in the trial court’s conclusion that mother simply failed to establish that it was in B.’s best interest to terminate the legal guardianship order at this time. There was no dispute that B. had had a tumultuous childhood – detained and placed in a legal guardianship with her grandmother, then detained from her grandmother and placed in foster care, and then placed with paternal aunt in foster care and, finally, legal guardianship with paternal aunt. And there was no dispute that B. had been thriving in that placement for several years. And mother has repeatedly demonstrated poor parenting judgment over the years she has been in the dependency system both with B. and the half siblings – most recently by asking B. to write a letter and then becoming angry with B. when B. said she did not want to write the letter. Under these circumstances, we cannot say that the juvenile court’s decision was arbitrary, capricious or patently absurd. Rather, we find it acted well within its discretion to deny the motion without prejudice, and encourage that more visits be facilitated between mother and B. to better establish that it would be in B.’s best interest to be once again placed in mother’s custody.

Mother’s reliance on *Michael D.*, *supra*, 51 Cal.App.4th 1074, for a contrary result is misplaced. In that case, DCFS appealed from an order granting the mother’s section 388 motion to terminate a legal guardianship and return the child to her custody. The appellate court rejected DCFS’s contention that the mother had to prove by clear and convincing evidence that the child was suffering detriment at the hands of a legal guardian in order to have the guardianship terminated. On the contrary, it held that it need only be proved by a preponderance of the evidence that termination of the legal

guardianship would be in the child's best interests, and that there are changed circumstances. (*Id.* at pp. 1086-1087.) Here, the juvenile court used the correct standard of proof.

We note that our opinion concludes only that it was not an abuse of discretion to deny the section 388 petition under the circumstances extant on October 10, 2007, the date the order was made. But dependency proceedings are ongoing and the dependency court retains the ability to respond to new information, including information brought before it in the context of additional section 388 petitions. (*Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 878-879.) Accordingly, nothing in this opinion precludes any party from bringing a new section 388 petition alleging changed circumstances or new evidence such that a modification would be in B.'s best interest.

DISPOSITION

The October 10, 2007 order is affirmed.

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RUBIN, J.

WE CONCUR:

COOPER, P. J.

FLIER, J.